Feb 22 2000

(6)

No. 99-579

Supreme Court, U.S.
FILED

FEB 22 2000

IN THE

Supreme Court of the United States

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, and AMERITECH CORPORATION,

Petitioners,

v.

SALOMON SMITH BARNEY INC. and SALOMON BROTHERS REALTY CORP.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

Of Counsel:

Susan R. Lichtenstein
Senior Vice President and
General Counsel
AMERITECH CORPORATION
30 South Wacker Drive
Chicago, Illinois 60606
(312) 750-5200

Patricia J. Winter
Counsel
AMERITECH CORPORATION
225 West Randolph Street
Chicago, Illinois 60606
(312) 727-2454

Robert A. Long, Jr.
Counsel of Record
John M. Vine
Michael R. Bergmann
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Charles C. Jackson
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Counsel for Petitioners

February 2000

56 pp

QUESTION PRESENTED

Whether a non-fiduciary party in interest with respect to an employee benefit plan that engages in a prohibited transaction, as defined in § 406(a)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1106(a)(1), with the plan can be sued under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), for "appropriate equitable relief," including restitution.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS AND RULE 29.6 STATEMENT

The Petitioners in this case are Harris Trust and Savings Bank, not individually but solely as Trustee for the Ameritech Pension Trust, and Ameritech Corporation. Petitioners were plaintiffs in the district court and appellees in the court of appeals.

Respondents Salomon Smith Barney Inc. and Salomon Brothers Realty Corp. were defendants in the district court and appellants in the court of appeals.

There were no other parties in the court of appeals.

Petitioner Harris Trust and Savings Bank is wholly owned by Harris Bankcorp Inc., which is in turn wholly owned by Bankmont Financial Corp., which is in turn wholly owned by Bank of Montreal, whose stock is publicly traded.

Petitioner Ameritech Corporation is a wholly-owned subsidiary of SBC Communications Inc., whose stock is publicly traded.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT 1

A. Statutory Background 1

B. The Facts Underlying This Case 6

C. Proceedings in the District Court 9

D. Proceedings in the Court of Appeals 11

SUMMARY OF ARGUMENT 13

ARGUMENT 15

I. ERISA AUTHORIZES CIVIL ACTIONS SEEKING RESTITUTION FROM NON-FIDUCIARY PARTIES IN INTEREST THAT ENGAGE IN PROHIBITED TRANSACTIONS WITH A PLAN. 15

A. ERISA Authorizes Actions Seeking "Appropriate Equitable Relief" For "Any Act Or Practice Which Violates Any Provision Of" Title I. 15

B. A Prohibited Transaction Between A Plan And A Party In Interest Is An "Act or Practice" That Violates Section 406(a). 19

C. Related Statutory Provisions Confirm That Parties In Interest Are Prohibited From Engaging In Transactions Specified In Section 406(a). 22

D. "Appropriate Equitable Relief" Includes Restitution Of Plan Assets Without Regard To Whether The Defendant Itself Violated ERISA. 28

E. The Secretary Of Labor's Interpretation Of The Statutory Language Is Entitled To Deference. 31

II. INTERPRETING SECTION 502 TO PERMIT RECOVERY OF PLAN ASSETS FURTHERS THE PRINCIPAL PURPOSE OF ERISA 33

A. Section 502(i) Does Not Provide Adequate Protection For Plan Participants And Beneficiaries. 33

B. Section 4975 Does Not Provide Adequate Protection For Plan Participants And Beneficiaries. 35

C. Other Potential Remedies Do Not Provide Adequate Protection For Plan Participants And Beneficiaries 38

III. THE LEGISLATIVE HISTORY OF ERISA IS CONSISTENT WITH THE STATUTORY LANGUAGE. 39

IV. THIS COURT'S DECISIONS IN *MERTENS* AND *LOCKHEED* DO NOT SUPPORT THE COURT OF APPEALS' DECISION. 44

A. *Mertens* Does Not Support The Court Of Appeals' Decision. 44

B. *Lockheed* Does Not Support The Court Of Appeals' Decision. 47

CONCLUSION 49

TABLE OF AUTHORITIES

Page(s)

CASES

Albee Tomato, Inc. v. A.B. Shalom Produce Corp., 155 F.3d 612 (2d Cir. 1998) 30

Auer v. Robbins, 519 U.S. 452 (1997) 32

Boggs v. Boggs, 520 U.S. 833 (1997) 2, 33

Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559 (1985) 1, 2, 28

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 32

Commissioner of Internal Revenue v. Keystone Consolidated Indus., Inc., 508 U.S. 152 (1993) 4

Curtis v. Loether, 415 U.S. 189 (1974) 31

Endico Potatoes, Inc. v. CIT Group/Factoring, Inc., 67 F.3d 1063 (2d Cir. 1995) 30

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 28

FMC Corp. v. Holliday, 498 U.S. 52 (1990) 38

Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980) 31

Health Cost Controls of Illinois, Inc. v. Washington, 187 F.3d 703 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 979 (2000) 29, 30

Herman v. South Carolina Nat'l Bank, 140 F.3d 1413 (11th Cir. 1998), *cert. denied*, 525 U.S. 1140 (1999) 21, 32, 38, 44, 48

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) 1, 2

John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank, 510 U.S. 86 (1993) 15, 33

Kelly v. Robinson, 479 U.S. 36 (1986) 15

Landwehr v. DuPree, 72 F.3d 726 (9th Cir. 1995) 10, 11, 44

LeBlanc v. Cahill, 153 F.3d 134 (4th Cir. 1998) 21, 32, 33, 44, 48
Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 2, 14, 15, 45, 47, 48
Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 22
Mead Corp. v. Tilley, 490 U.S. 714 (1989) 31
Mertens v. Hewitt Associates, 948 F.2d 607 (9th Cir. 1991) 45
Mertens v. Hewitt Associates, 508 U.S. 248 (1993) ..... *passim*
Miles v. Apex Marine Corp., 498 U.S. 19 (1990) 31
Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980) 2
Nieto v. Ecker, 845 F.2d 868 (1998) 11, 33, 35, 40
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 2, 15, 20
Reich v. Compton, 57 F.3d 270 (3d Cir. 1995) ..... .10, 27, 32, 33, 44
Reich v. Continental Cas. Co., 33 F.3d 754 (7th Cir. 1994) 29, 38
Reich v. Rowe, 20 F.3d 25 (1st Cir. 1994) 10, 21, 39, 44
Reich v. Stangl, , 73 F.3d 1027 (10th Cir.), *cert. denied*, 519 U.S. 807 (1996) 10, 21, 27, 32, 33, 40, 44
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 1, 2
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 32
Traynor v. Turnage, 485 U.S. 535 (1988) 31
Useden v. Acker, 947 F.2d 1563 (11th Cir. 1991), *cert. denied*, 508 U.S. 959 (1993) 17
Varity Corp. v. Howe, 516 U.S. 489 (1996) 3, 16, 17, 24 26, 28, 33, 40, 43

FEDERAL STATUTES AND LEGISLATIVE MATERIALS

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* 31
Internal Revenue Code § 4975, 26 U.S.C. § 4975 ..... 2, 5, 6, 14, 23, 26, 27, 35, 37, 46
28 U.S.C. § 1254(l) 1
28 U.S.C. § 1292(b) 11
ERISA, 88 Stat. 829 (1974), as amended, 29 U.S.C. §§ 1001-1461 1
ERISA §§ 1-734, 29 U.S.C. §§ 1101-1191 3
ERISA § 2, 29 U.S.C. §1001 2
ERISA § 3(9), 29 U.S.C. §1002(9) 26
ERISA § 3(14), 29 U.S.C. § 1002(14) 4, 5, 7, 37
ERISA § 3(21), 29 U.S.C. § 1002(21) 5, 7, 8
ERISA § 3(38), 29 U.S.C. § 1002(38) 8
ERISA §§ 401-414, 29 U.S.C. §§ 1101-1114 22
ERISA § 402(b), 29 U.S.C. § 1102(b) 22
ERISA § 402(c)(3), 29 U.S.C. § 1102(c)(3) 8
ERISA § 404, 29 U.S.C. § 1104 ..... 11, 24
ERISA § 405, 29 U.S.C. § 1105 ..... 26, 46
ERISA § 406(a), 29 U.S.C. § 1106(a) ..... *passim*
ERISA § 407(a), 29 U.S.C. § 1107(a) 4, 24
ERISA § 408, 29 U.S.C. § 1108 ..... 5, 24
ERISA § 409, 29 U.S.C. § 1109 ..... 17, 43, 46
ERISA § 411, 29 U.S.C. § 1111 22
ERISA § 412, 29 U.S.C. § 1112 22
ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) 17, 46
ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) ..... *passim*
ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5) ..... *passim*
ERISA § 502(i), 29 U.S.C. § 502(i) 5, 12, 14, 23, 24, 33, 34, 35
ERISA § 502(*l*), 29 U.S.C. § 1132(*l*) 24, 25, 26, 47
ERISA § 514(a), 29 U.S.C. § 1144(a) 38, 39
ERISA § 3003, 29 U.S.C. § 1203 ..... 22, 23, 35

H.R. 2, 93d Cong., 2d Sess. (as passed by the House on Feb. 28, 1974) 43
H.R. 2, 93d Cong., 2d Sess. (as passed by the Senate on March 4, 1974) 41, 42, 43
H.R. Conf. Rep. No. 93-1280 (1974) 12, 40, 41, 43
H.R. Conf. Rep. No. 101-386 (1989) 34
H.R. Conf. Rep. No. 105-220 (1997) 36
H.R. Rep. No. 93-533 (1973) 17, 40
Joint Committee on Taxation, *Estimated Budget Effects of Chairmans Mark of a Committee Amendment to the Revenue Provisions of H.R. 3448, the "Small Business Job Protection Act of 1996," Scheduled for Finance Committee Markup on June 12, 1996*, No. JCX-27-96 (June 11, 1996) 36
S. Rep. No. 93-127 (1973) 17, 40
S. Rep. No. 93-383 (1973). 18, 29

MISCELLANEOUS

5 Austin Wakeman Scott & William Franklin Fratcher, *Trusts* (4th ed. 1989) 29, 30
George Gleason Bogert, *Trusts and Trustees* (rev. 2d ed. 1960) 29
Dan B. Dobbs, *Law of Remedies* (2d ed. 1993) 29, 30
Financial Management Service, U.S. Department of the Treasury, *United States Government Annual Report – Fiscal Year 1997* (Receipts by Source Category) 36
Restatement of Restitution (1937) 29, 30
Restatement (Second) of Trusts (1959) 30
U.S. Department of Labor, *Private Pension Plan Bulletin: Abstract of 1995 Form 5500 Annual Reports*, No. 8 (Spring 1999) 19

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals, J.A. 342-354, is reported at 184 F.3d 646. The memorandum decision of the district court, J.A. 283-324, as modified, J.A. 325, is not reported. The opinions of the district court denying reconsideration, J.A. 326-330, and certifying the question presented for interlocutory appeal to the court of appeals, J.A. 338-341, are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1999. J.A. 342. The petition for a writ of certiorari was filed on October 4, 1999, and was granted on January 7, 2000. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(l).

STATUTES INVOLVED

Relevant provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 829 (1974), codified as amended at 29 U.S.C. § 1001 *et seq.*, are reproduced at Pet. App. 66a-77a and J.A. 234-273.

STATEMENT

A. Statutory Background

1. ERISA. "ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983)). "Congress enacted ERISA after 'almost a decade of studying the Nation's private pension plans' and other employee benefit plans." *Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 569

(1985) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980)). "Congress found that there had been a 'rapid and substantial' growth in the 'size, scope and numbers' of employee benefit plans and that 'the continued well-being and security of millions of employees and their dependents are directly affected by these plans.'" *Central States*, 472 U.S. at 569 (quoting ERISA § 2, 29 U.S.C. § 1001(a)).[1]

"The principal object of [ERISA] is to protect plan participants and beneficiaries." *Boggs v. Boggs*, 520 U.S. 833, 845 (1997) (citing *Shaw*, 463 U.S. at 90). To achieve this goal, "Congress included [in ERISA] various safeguards to preclude abuse and to completely secure the rights and expectations brought into being by this landmark reform legislation." *Ingersoll-Rand*, 498 U.S. at 137 (internal quotation and citation omitted). ERISA "tries to 'make as certain as possible that pension fund assets [will] be adequate' to meet expected benefits payments." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (quoting *Nachman*, 446 U.S. at 375).

ERISA's civil enforcement provisions, found in Section 502(a) of the statute, 29 U.S.C. § 1132(a), are "one of the essential tools for accomplishing the stated purposes of ERISA." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987). In Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), Congress provided:

---

[1] In this brief, references to provisions of Title I of ERISA are generally to the relevant section of ERISA (*e.g.*, "ERISA § 406") with a parallel citation to Title 29 of the U.S. Code (*e.g.*, 29 U.S.C. § 1106). References to provisions of Title II of ERISA (which amended provisions of the Internal Revenue Code) are generally to the relevant section of Title 26 of the U.S. Code (*e.g.*, 26 U.S.C. § 4975).

> A civil action may be brought – by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

In Section 502(a)(5) of ERISA, 29 U.S.C. § 1132(a)(5), Congress used identical language to authorize the Secretary of Labor to bring civil actions "to enjoin any act or practice which violates any provision of this title," or "to obtain other appropriate equitable relief."[2] Section 502(a)(3) and (a)(5) are "catchall" provisions designed to act as a "safety net" to ensure that appropriate equitable relief is available for all violations of ERISA. *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996).

2. Prohibited Transactions and Parties in Interest. One of the ways in which ERISA protects plan assets is by prohibiting transactions that Congress viewed as likely to threaten plan assets and beneficiaries. As this Court has explained:

> Before ERISA's enactment in 1974, the measure that governed a transaction between a pension plan and its sponsor was the customary arm's-length standard of conduct. This provided an open door for abuses such as the sponsor's sale of property to the plan at an inflated price or the sponsor's satisfaction of a funding obligation by contribution of property that was overvalued or nonliquid.

---

[2] "[T]his title" refers to Title I of ERISA, §§ 1-734, 29 U.S.C. §§ 1001-1191c.

Commissioner of Internal Revenue v. Keystone Consol. Indus., Inc., 508 U.S. 152, 160 (1993). To address such abuses, Congress broadly prohibited various types of transactions between plans and "parties in interest," without regard to whether the terms of the transactions were arm's-length. *See* ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1).[3] In enacting the prohibited transaction provisions, "Congress' goal was to bar categorically a transaction that was likely to injure the [employee benefit] plan." *Keystone*, 508 U.S. at 160.

ERISA defines a "party in interest" with respect to an employee benefit plan to include, among other persons, any fiduciary of the plan, any "person providing services to" the plan, an employer whose employees are covered by the plan, an employee organization whose members are covered by the plan, and certain relatives of parties in interest. ERISA § 3(14), 29 U.S.C. § 1002(14).[4] Congress provided for

---

[3] Section 406(a)(1) provides that prohibited transactions include a "direct or indirect –

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;
(B) lending of money or other extension of credit between the plan and a party in interest;
(C) furnishing of goods, services, or facilities between the plan and a party in interest;
(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or
(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a) [29 U.S.C. § 1107a]."

ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1).

[4] The term "party in interest" thus includes all fiduciaries with respect to a plan, as well as certain non-fiduciaries. ERISA defines a "fiduciary" with respect to a plan as a person who (among other things) "exercises any discretionary authority or discretionary control respecting management of such plan or exercises any

(...footnote continued)

specific statutory and administrative exemptions to the broad prohibitions of ERISA § 406. *See* ERISA § 408, 29 U.S.C. § 1108. Parties in interest who engage in prohibited transactions with a plan may be subject to civil penalties. ERISA § 502(i), (*l*) 29 U.S.C. § 1132(i), (*l*).

3. Prohibited Transactions Under the Internal Revenue Code. Internal Revenue Code § 4975 (originally enacted as part of Title II of ERISA) imposes a two-tier excise tax on "disqualified persons" who engage in "prohibited transactions" involving tax-qualified plans, individual retirement accounts and annuities, medical savings accounts, and education individual retirement accounts. *See* 26 U.S.C. § 4975(a), (b), (e)(1). The definition of "disqualified person" in § 4975 is similar (although not identical) to the definition of "party in interest" in ERISA § 3(14). *See id.* § 4975(e)(2). Likewise, the definition of "prohibited transaction" under § 4975 is similar (but not identical) to the definition in ERISA § 406. *See id.* § 4975(c). Section 4975 contains exemptions similar to those in ERISA § 408. *See id.* § 4975(d).

Congress initially set the first-tier excise tax at 5 percent of the amount involved with respect to the prohibited transaction. In 1996, it raised the first-tier tax to 10 percent; in 1997, it raised the first-tier tax again to 15 percent. *See id.* § 4975(a). The first-tier tax applies to each full or partial year in the "taxable period," which begins when the prohibited transaction occurs and ends not later than when the prohibited transaction is corrected. *Id.* § 4975(a) & (f)(2). Thus, depending on the year in which the transaction

---

(. . . continued)
authority or control respecting management or disposition of its assets." ERISA § 3(21), 29 U.S.C. § 1002(21).

occurred, the first-tier tax ranges from 5 percent to 15 percent per year.

If the prohibited transaction is not "corrected within the taxable period," a second-tier tax of 100 percent of the amount involved is imposed. *Id.* § 4975(b). A "correction" is defined as "undoing the [prohibited] transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards." *Id.* § 4975(f)(5). Both taxes are imposed on "any disqualified person who participate[d] in the prohibited transaction (other than a fiduciary acting only as such)." *Id.* § 4975(a), (b).

Section 4975(h) provides that "[b]efore sending a notice of deficiency with respect to the tax imposed by subsection (a) or (b), the Secretary shall notify the Secretary of Labor and provide him a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax." *Id.* § 4975(h).

B. The Facts Underlying This Case

Petitioner Ameritech Corporation is the plan sponsor and plan administrator of pension plans for employees and retirees of Ameritech and its affiliates and subsidiaries.[5] At all relevant times, Petitioner Harris Trust and Savings Bank was the Trustee for the Ameritech Pension Trust, through which plans with some 118,000 participants and beneficiaries are funded. Ameritech, as plan administrator, and Harris

[5] Some of the facts set forth herein are contested by Salomon. Because of the course that proceedings took below, the lower courts did not resolve such factual disputes, but instead resolved the question of law presented here on the assumption that Ameritech's factual allegations are correct.

Trust, as trustee, were plan fiduciaries as defined in ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). J.A. 236.

Respondents Salomon Smith Barney Inc. and Salomon Brothers Realty Corp. (collectively "Salomon") were service providers to the plans. *Id.* 343. Salomon received hundreds of thousands of dollars per year in commissions and other compensation for securities brokerage and other services provided to the plans during the relevant years. C.A. Supp. App. 91-92, 419-56. As provider of these services, Salomon was a "party in interest" with respect to the plans within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14). The district court found, however, that Salomon was not, by virtue of its provision of these services or of investment advice to the plans, a fiduciary of the plans. J.A. 289-299.

Between 1987 and 1989, Salomon acted as placement agent for three issuances of mortgage notes by Motels of America, Inc., and one issuance of mortgage notes by Best Inns, Inc. In connection with each of these transactions, Salomon entered into a "Fee Agreement" with the issuer, under which, as consideration for its services, Salomon became entitled to fees based on a percentage of any "net cash flow" generated by the motels involved, plus a percentage of any appreciation of the motel properties upon maturity of the associated notes or sale of the properties. *Id.* 342-343.

Between 1987 and 1989, Salomon sold a 100 percent interest in one of the Fee Agreements and 95 percent interests in the other three Fee Agreements to the Ameritech Pension Trust for nearly $21 million. *Id.* 287. The purchases were directed by National Investment Services of America ("NISA"), an investment manager to which Ameritech had delegated investment discretion over a portion of the Trust's assets. J.A. 311; C.A. Supp. App. 105-06. By virtue of its discretion over investment of plan assets, NISA was a plan fiduciary within the meaning of ERISA § 3(21)(A), 29

U.S.C. § 1002(21)(A). *See also* ERISA §§ 3(38), 402(c)(3), 29 U.S.C. §§ 1002(38), 1102(c)(3). Petitioners maintain that the Fee Agreement sales were prohibited transactions and did not qualify for any of the statutory or regulatory exemptions from prohibited transaction status. J.A. 299-300, 313.

Salomon failed to make timely disclosure of information it had as to the extreme riskiness, poor performance, and low value of the Fee Agreements. *Id.* 288. Two senior employees of Motels of America testified that the Fee Agreements were so risky and of such low value that "it was kind of like selling air." *Id.* 84; *see also id.* 131 ("they bought air").[6]

The Fee Agreements proved to be nearly worthless. *Id.* 288. Both issuers went into bankruptcy. After taking all reasonable steps to mitigate its losses, the Ameritech Pension Trust lost $19,889,602 of the $20,915,000 it paid for these investments. C.A. Supp. App. 170, 177, 180. Salomon, which had a basis of zero in the Fee Agreements, reaped a profit of $20,915,000 from selling them to the Trust. C.A. Supp. App. 105, 127-29, 393-95. An internal Salomon document describes one of the transactions as "an extraordinary sales achievement and profit to [Salomon] as a result of [a Salomon employee's] relationship with his account and his desire to focus on our priorities." J.A. 190.

---

[6] The record contains parol evidence that Salomon agreed to monitor the performance of the Fee Agreements. *E.g.*, J.A. 57-61. The district court held (in a ruling not yet subject to appeal) that such evidence is inadmissible to show that Salomon was a fiduciary with respect to the plans. *Id.* 295-299. But the district court recognized that the evidence is admissible for other purposes, such as to show fraud. *Id.* 298-299.

C. Proceedings in the District Court

Petitioners filed suit against Salomon in 1992, asserting claims under ERISA, the Racketeer Influenced and Corrupt Organizations Act, and state law. Count II of the Second Amended Complaint asserts that, in selling the Fee Agreements to the Pension Trust, Salomon, a party in interest with respect to the plans, participated in a prohibited transaction under ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1), and is liable to provide restitution under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). *Id.* 39-42.

Salomon moved for summary judgment on Count II, contending that only fiduciaries that cause plans to enter into prohibited transactions, and not non-fiduciary parties in interest that participate in such transactions, can be liable under § 502(a)(3) to provide appropriate equitable relief with regard to such transactions.

The district court denied the motion. *Id.* 299-310. The court addressed "two closely related but distinct issues: whether it is a violation of ERISA for a nonfiduciary party in interest to engage in a [Section 406(a)] prohibited transaction and, if yes, whether ERISA affirmatively authorizes plaintiffs to bring suit to redress such a violation." *Id.* 300-301. The court answered both questions in the affirmative.

In analyzing the first question, the district court observed that this Court, in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), contrasted the absence of any provision in ERISA requiring a non-fiduciary to avoid participating in a fiduciary's violation of a fiduciary obligation with "other provisions which . . . can be read to impose an obligation on nonfiduciary parties in interest to avoid participation in [Section 406(a)] transactions." J.A. 302. Indeed, the district court noted, "Salomon seems to accept *Mertens'* belief that [Section 406(a)] can be read as imposing obligations on nonfiduciary parties in interest." *Id.* The court observed that several courts of appeals have "acknowledged the

significance of this distinction and have concluded that parties in interest are obligated to avoid the transactions prohibited in § 1106(a)." *Id.* (citing *Reich v. Stangl*, 73 F.3d 1027, 1032 (10th Cir.), *cert. denied*, 519 U.S. 807 (1996); *Landwehr v. Dupree*, 72 F.3d 726, 734 (9th Cir. 1995); *Reich v. Compton*, 57 F.3d 270, 285 (3d Cir. 1995); *Reich v. Rowe*, 20 F.3d 25, 31 n.7 (1st Cir. 1994)). The district court pointed to statements in the legislative history of ERISA in support of its conclusion. *Id.* 303. In addition, the court commented that "if there were no duty to avoid such transactions, one might wonder whether there is any basis for imposing administrative penalties against parties in interest." *Id.* 304 n.13. The court concluded that "[p]arties in interest, even if not fiduciaries of a plan, have a duty under [§ 406(a)] to avoid the transactions identified therein." *Id.* 304.

In addressing the second question – whether ERISA authorizes a private cause of action to recover against non-fiduciary parties in interest who violate ERISA § 406(a) – the court observed that "[t]he language of [§ 502(a)(3)] is plainly broad enough to constitute the needed 'affirmative authorization.'" *Id.* 305. Under the terms of Section 502(a)(3), "plaintiffs are entitled to bring an equitable action to redress any violation of ERISA or to enforce the terms of the statute." *Id.* The court noted that its conclusion accords with *Mertens*, which stated that "[p]rofessional service providers . . . must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by [ERISA § 406], and pay related civil penalties [under ERISA § 502(i)]." *Id.* 306 (quoting *Mertens*, 508 U.S. at 262).

The court rejected, as contrary to the language and purposes of ERISA, Salomon's argument that administrative penalties and excise taxes are the exclusive remedies available against parties in interest who engage in prohibited transactions. The court observed that administrative penalties and excise taxes "would provide little, if any,

protection for the interests of the plan participants," and that "limiting the potential defendants to only one of two parties to the transaction . . . would render the available relief wholly inadequate." *Id.* 307-308 (citing *Landwehr*, 72 F.3d at 734, in turn citing *Nieto v. Ecker*, 845 F.2d 868, 874 (1998)).

Subsequently, the district court certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) the question whether a non-fiduciary party in interest who engages in a prohibited transaction with a plan may be sued for appropriate equitable relief under ERISA § 502(a)(3). *Id.* 338-341.

D. Proceedings in the Court of Appeals

The court of appeals reversed. *Id.* 342-354. While recognizing that every other circuit to address the issue has agreed with the district court, the court of appeals nevertheless held that "[a] nonfiduciary cannot violate [ERISA § 406] and therefore cannot be liable under [§ 502(a)(3)] for participating in a [§ 406] transaction." *Id.* 354.

In the court of appeals' view, § 406 "imposes no explicit duty on parties in interest." *Id.* 348. In an earlier case, the court of appeals adopted the position, based on its understanding of this Court's *dicta* in *Mertens*, "that where ERISA does not expressly impose a duty, there can be no cause of action." *Id.* 348-349. The court of appeals saw "no material distinction between that case and this." *Id.* 349. The court concluded that "[t]he mere fact that [§ 406] mentions 'parties in interest' when it describes the transactions that fiduciaries must avoid does not mean that parties in interest are liable when a fiduciary does engage in a prohibited transaction." *Id.*

The court of appeals recognized that *Mertens* acknowledged one "viable distinction . . . between the position of participating parties in interest under [§ 404] and

participating parties in interest under [§ 406]," namely, "that one of the Act's remedial provisions imposes civil penalties on parties in interest when they participate in a transaction prohibited by [§ 406]." *Id.* 349-350 (citing ERISA § 502(i), 29 U.S.C. § 1132(i)). But the court of appeals concluded that "[i]f Congress had wanted to place remedial power against nonfiduciaries in the hands of private parties it would have done so more explicitly." *Id.* 350.

Although the court of appeals "hesitate[d] to give too much weight to legislative history," it nevertheless found support for its interpretation in the legislative history of ERISA. The court of appeals acknowledged that the ERISA Conference Committee Report states that ERISA prohibits "'plan fiduciaries and parties in interest' from engaging in the listed transactions," and that this statement implies "that both parties to the transaction would be liable." *Id.* 352 (quoting H.R. Conf. Rep. No. 93-1280, at 306 (1974), *reprinted in* 3 Staff of Sen. Subcomm. on Labor, Comm. on Labor & Public Welfare, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974 4573 (Comm. Print 1976) (hereinafter "Leg. Hist."). But the court of appeals noted that the version of ERISA originally passed by the Senate included language that explicitly imposed liability on non-fiduciaries, and that the final version of ERISA did not include this language. The court inferred that Congress considered imposing civil liability on parties in interest for engaging in prohibited transactions, but decided not to do so.

The court of appeals ended its opinion by acknowledging that "[w]hether there is a private cause of action against nonfiduciary parties in interest under [§ 406] is a difficult issue." *Id.* 353. The court concluded that "[u]ltimately, the dicta in *Mertens* . . . provide[ ] the most guidance," and held that non-fiduciary parties in interest who engage in prohibited transactions are not subject to suit.

SUMMARY OF ARGUMENT

I. ERISA provides that "[a] civil action may be brought . . . to enjoin any act or practice which violates any provision of this title . . . or to obtain other appropriate equitable relief. . . to redress such violation." ERISA § 502(a)(3) & (a)(5), 29 U.S.C. § 1132(a)(3) & (a)(5). The statutory language refers to "any act or practice which violates" ERISA, rather than to "any person who violates ERISA."

The court of appeals erred in holding that ERISA Section 406(a), 29 U.S.C. § 1106(a), applies only to fiduciaries that cause a plan to engage in a prohibited transaction. As the title of § 406 indicates, Congress intended to bar *transactions* between plans and parties in interest. Several related statutory provisions confirm that Congress intended the prohibitions of § 406(a) to apply to non-fiduciary parties in interest.

In any event, the availability of "appropriate equitable relief" against non-fiduciary parties in interest who engage in prohibited transactions does not depend on whether the non-fiduciary party in interest has itself violated Section 406(a). It is undisputed that a fiduciary that causes a plan to engage in a prohibited transaction violates Section 406(a). Under well-established equitable principles, restitution is available against a party in interest who comes into possession of plan assets as a result of an ERISA violation without regard to whether the party in interest has itself violated the statute. The relevant question is not whether the defendant is a wrongdoer, but whether the defendant would be unjustly enriched by retaining the assets.

The statutory language thus provides a clear answer to the question presented in this case. Even if the language were ambiguous, however, deference would be due to the Secretary of Labor's consistent view that actions for equitable relief are available against non-fiduciary parties in interest.

II. ERISA's principal purpose – protection of plan participants and beneficiaries – is furthered by interpreting ERISA to authorize actions to recover plan assets transferred in prohibited transactions. If such actions are not available, it will often be difficult or impossible to undo a prohibited transaction. ERISA § 502(i) and 26 U.S.C. § 4975 provide insufficient protection for plan assets. A fiduciary who causes a plan to enter into a prohibited transaction typically is not in possession of plan assets transferred to the party in interest, and may not have sufficient assets of its own to make up the loss to the plan. Furthermore, state law claims against non-fiduciaries may well be barred by ERISA's powerful preemption clause. Consequently, if plan participants and beneficiaries lack a remedy against non-fiduciary parties in interest under § 502(a)(3), they may be left with no effective means of recovering plan assets.

III. The legislative history of ERISA is consistent with the statutory text. The Conference Report states that ERISA § 406 prohibits both plan fiduciaries and parties in interest from engaging in prohibited transactions. The version of ERISA originally enacted by the Senate explicitly imposed liability on non-fiduciaries, while the House version provided a more limited range of civil remedies. Although the final version of ERISA did not include the specific language from the Senate bill, it broadened the House version by authorizing actions for "appropriate equitable relief" to redress any violation of Title I of ERISA.

IV. This Court's decisions in *Mertens* and *Lockheed* are consistent with the conclusion that equitable relief is available under § 502(a)(3) and (a)(5) against a non-fiduciary party in interest that engages in a prohibited transaction. *Mertens* holds that a damages award (unlike a restitution order requiring the defendant to return plan assets and profits) is not "appropriate equitable relief" under Section 502(a)(3) or (a)(5). In *dicta*, the Court expressed doubt that ERISA authorizes actions against non-fiduciaries that assist a

fiduciary in violating a fiduciary obligation. But the Court took pains to distinguish non-fiduciaries who assist in violating fiduciary duties from parties in interest who engage in prohibited transactions with a plan. Moreover, the Court's opinion in *Lockheed* expressly reconciles the decision in that case with decisions upholding party-in-interest liability.

ARGUMENT

I. ERISA AUTHORIZES CIVIL ACTIONS SEEKING RESTITUTION FROM NON-FIDUCIARY PARTIES IN INTEREST THAT ENGAGE IN PROHIBITED TRANSACTIONS WITH A PLAN.

When confronted with a question of statutory interpretation, this Court "examine[s] first the language of the governing statute." *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94 (1993). The Court's examination is "guided not by 'a single sentence or member of a sentence, but look[s] to the provisions of the whole law, and to its object and policy.'" *Id.* at 94-95 (quoting *Pilot Life Ins. Co.*, 481 U.S. at 51, in turn quoting *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (internal quotation marks omitted)). In this case, examination of the statutory language leads to the conclusion that ERISA authorizes civil actions seeking equitable relief, including restitution of plan assets, from non-fiduciary parties in interest that engage in prohibited transactions with a plan.

A. ERISA Authorizes Actions Seeking "Appropriate Equitable Relief" For "Any Act Or Practice Which Violates Any Provision Of" Title I.

Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), provides:

> A civil action may be brought – by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate

> equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

Section 502(a)(5) of ERISA, 29 U.S.C. § 1132(a)(5), uses identical language to authorize the Secretary of Labor to bring civil actions "to enjoin any act or practice which violates any provision of this title," or "to obtain other appropriate equitable relief." Since the language of Subsections (3) and (5) is the same, those provisions should be interpreted to have the same meaning. *See Mertens*, 508 U.S. at 260 ("[L]anguage used in one portion of a statute (§ 502(a)(3)) should be deemed to have the same meaning as the same language used elsewhere in the statute (§ 502(a)(5))."); *see also Varity Corp.*, 516 U.S. at 510 ("Subsection (5) is identical to subsection (3), except that it authorizes suits by the Secretary, rather than the participants and beneficiaries.").

The language of Subsections (3) and (5) is strikingly broad. Congress authorized civil actions to remedy "*any* act or practice which violates *any* provision of this title." (Emphasis added). As this Court has recognized, Subsections (3) and (5) are "catchall" provisions." *Varity Corp.*, 516 U.S. at 512. The broad scope of Subsections (3) and (5) follows not only from their language but also from "§ 502's overall structure." *Id.*

> Four of [Section 502(a)'s then] six subsections focus upon specific areas, *i.e.*, the first (wrongful denial of benefits and information), the second (fiduciary obligations related to the plan's financial integrity), the fourth (tax registration), and the sixth (civil penalties). The language of the other two subsections, the third and the fifth, creates two "catchalls," providing "appropriate equitable relief" for "any" statutory violation. This structure suggests that these "catchall" provisions act as a safety net, offering appropriate

> equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy.

Id.[7]

Two aspects of the language of Subsections (3) and (5) are especially pertinent to the issue presented in this case. First, Congress authorized civil actions to remedy "*any act or practice* which violates any provision of this title." (Emphasis added.) Congress did not limit the scope of Subsections (3) and (5) by authorizing civil actions only against "any fiduciary who violates any provision of this title," or even against "any person who violates any provision of this title." Instead, Subsections (3) and (5) authorize actions for equitable relief to redress violations of ERISA "without restricting the types of parties who may be so sued." *Useden v. Acker*, 947 F.2d 1563, 1581 (11th Cir. 1991), *cert. denied*, 508 U.S. 959 (1993).[8]

A second aspect of the statutory language confirms that Congress's reference to "any act or practice which violates any provision of this title," rather than to "any person who

---

[7] *Varity*'s broad interpretation of Subsections (3) and (5) is consistent with the legislative history of ERISA. *See* 516 U.S. at 512 (citing S. Rep. No. 93-127, at 35 (1973), 1 Leg. Hist. 621 (describing Senate version of enforcement provisions as intended to "provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]"); H.R. Rep. No. 93-533, at 17 (1973), 2 Leg. Hist. 2364 (describing House version in identical terms)); *see also infra* pages 39-44 (discussing ERISA's legislative history).

[8] Subsections (3) and (5) specifically restrict the types of *plaintiffs* entitled to bring a civil action. Congress did not use similar language to restrict the types of defendants who may be sued. Moreover, limiting relief to "any fiduciary that violates any provision of this title" would render Subsections (3) and (5) superfluous, since Subsection (2) already authorizes such relief. *See* ERISA §§ 409, 502(a)(2), 29 U.S.C. §§ 1109, 1132(a)(2).

violates any provision of this title," was not a casual oversight. Subsections (3) and (5) authorize courts to award "*appropriate equitable relief*" to redress any act or practice that violates a provision of ERISA Title I. (Emphasis added.) This statutory language incorporates a body of pre-ERISA law concerning equitable remedies. As explained below (*see* pages 28-31), appropriate equitable relief includes remedies (such as restitution pursuant to a constructive trust) that are not limited to wrongdoers, but instead reach all persons who would be unjustly enriched by retaining plan assets. Thus, Congress's reference to "appropriate equitable relief" dovetails with its reference to "any act or practice which violates" ERISA, and reinforces the conclusion that Congress did not restrict actions under Subsections (3) and (5) to persons who violate ERISA.[9]

It is undisputed that Petitioners are fiduciaries within the meaning of ERISA, *see* J.A. 285, and therefore may bring a civil action under Subsection (3) for "appropriate equitable relief" to redress "any act or practice which violates any provision of" ERISA Title I. The decisive issues in this case are therefore: (1) whether Petitioners are seeking to redress "any act or practice which violates any provision of" Title I; and (2) if so, whether Petitioners are seeking "appropriate equitable relief" to redress the violation. As explained below, the answer to both these questions is clearly "yes." A prohibited transaction between a plan and a party in interest is an "act or practice" that violates § 406(a) of ERISA, 29 U.S.C. § 1106(a). *See infra* pages 19-27. And the "equitable relief" awardable under Subsections (3) and (5) includes

---

[9] The statutory text is reinforced by ERISA's legislative history, which states that "appropriate equitable relief" includes "a constructive trust . . . imposed on the plan assets, if needed to protect the participants and beneficiaries." S. Rep. No. 93-383, at 105 (1973), 1 Leg. Hist. 1173.

restitution of plan assets and profits. *Mertens*, 508 U.S. at 260; *see infra* pages 28-31.

B. A Prohibited Transaction Between A Plan And A Party In Interest Is An "Act or Practice" That Violates Section 406(a).

Section 406 of ERISA, 29 U.S.C. § 1106, entitled "Prohibited transactions," contains § 406(a), entitled "Transactions between plan and party in interest," which provides, in part:

> A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect –
>
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
>
> . . .
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

29 U.S.C. § 1106(a)(1). In interpreting this statutory language, the court of appeals focused on whether § 406(a) is addressed solely to fiduciaries that cause plans to enter into prohibited transactions with a party in interest. *See* J.A. 349. If (as most courts of appeals have held) § 406(a) prohibits *transactions* between a plan and a party in interest, then a party in interest who engages in such a transaction violates § 406(a) (a provision of ERISA Title I), and therefore is subject to an action for appropriate equitable relief under § 502(a)(3) and (a)(5). In this case, however, the court of appeals read § 406(a) as merely prohibiting fiduciaries from *causing* plans to engage in transactions with parties in interest. If a non-fiduciary party in interest cannot violate § 406(a), the court reasoned, it cannot be sued for equitable relief under § 502(a)(3) or (a)(5).

The court of appeals' conclusion does not follow from its premise. Even if § 406(a) applied only to fiduciaries, it would not follow that relief is unavailable under § 502(a)(3) and (a)(5) against non-fiduciary parties in interest. When a fiduciary causes a plan to engage in a prohibited transaction with a party in interest, there is plainly an "act or practice which violates" § 406(a), even if the party in interest itself does not violate § 406(a). As explained below (*see* pages 28-31), "appropriate equitable relief' for such a violation includes a restitutionary order requiring the party in interest to disgorge the plan's assets even if the party in interest did not violate any provision of ERISA. Consequently, the answer to the question presented in this case does not ultimately depend on whether a non-fiduciary party in interest who engages in a prohibited transaction with a plan violates § 406(a).

Moreover, the court of appeals' premise is incorrect: § 406(a) does not pertain solely to fiduciaries. The court of appeals relied primarily on the opening clause of § 406: "A fiduciary . . . shall not cause the plan to engage in a [prohibited] transaction . . . ." Because § 406(a) does not contain a similar clause explicitly directing parties in interest not to engage in prohibited transactions, the court concluded that it is addressed solely to fiduciaries. J.A. 348-49.

The court of appeals focused on "a single . . . member of a sentence," rather than "look[ing] to the provisions of the whole law." *Pilot Life Ins. Co.*, 481 U.S. at 51 (additional citations and quotation marks omitted). When Section 406(a) is read as a whole, and in conjunction with other provisions of ERISA, it is clear that Congress intended to prohibit *transactions* between plans and parties in interest, and that the prohibitions of Section 406(a) apply to parties in interest who engage in such transactions as well as to fiduciaries who cause plans to engage in them.

The text of Section 406(a) does not compel the conclusion that it is addressed solely to fiduciaries. The court of appeals' interpretation rests on an inference (Congress expressly prohibited fiduciaries from causing plans to engage in prohibited transactions; it did not expressly prohibit non-fiduciary parties in interest from engaging in such transactions; therefore, Congress did not intend to prohibit non-fiduciary parties in interest from engaging in such transactions). Such an inference may, of course, be overcome by textual evidence of a contrary legislative intent.

As other courts of appeals have recognized, when a fiduciary causes a plan to engage in a prohibited transaction with a party in interest, the party in interest is an essential party to the violation of § 406(a).[10] As the headings of § 406 and 406(a) indicate, it is the *transaction* that is prohibited:

> While § 406 does instruct fiduciaries – typically the plan trustees – not to cause the plan to enter into transactions with "parties in interest," § 406 also serves to prohibit transactions between a [plan] and a "party in interest." Even if § 406 imposes an affirmative duty on fiduciaries not to cause the plan to enter into certain prohibited transactions, this in no sense lessens the fact that a transaction between a plan and a "party in interest" remains a prohibited transaction under § 406.

Herman v. South Carolina Nat'l Bank, 140 F.3d 1413, 1421 (11th Cir. 1998), *cert. denied*, 525 U.S. 1140 (1999); *see also Reich v. Rowe*, 20 F.3d at 31 n.7.

---

[10] *See, e.g., LeBlanc v. Cahill*, 153 F.3d 134, 150-51 (4th Cir. 1998); *Reich v. Stangl*, 73 F.3d at 1031.

C. Related Statutory Provisions Confirm That Parties In Interest Are Prohibited From Engaging In Transactions Specified In Section 406(a).

In construing ERISA, this Court will not engage in the "'blue pencil' method of statutory interpretation – omitting all words not part of the clauses deemed pertinent to the task at hand." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985). When the opening clause of § 406(a) is read in conjunction with other relevant statutory provisions, it is clear that Congress intended to prohibit non-fiduciary parties in interest from engaging in prohibited transactions with a plan.[11]

1. **Section 3003(c).** ERISA § 3003, 29 U.S.C. § 1203, sets out "Procedures in connection with prohibited transactions." Section 3003(c) provides: "Whenever the Secretary of Labor obtains information indicating that *a party-in-interest or disqualified person is violating section 406 of this Act*, he shall transmit such information to the Secretary of the Treasury." 29 U.S.C. § 1203(c) (emphasis added). Section 3003(c) thus states, in express terms, that a party in interest may violate § 406. Consequently, this

[11] The court of appeals believed that its interpretation is "strengthened when we consider the [statutory] context" of ERISA § 406(a), because ERISA §§ 401-414, 29 U.S.C. §§ 1101-1114, "deal with 'Fiduciary Responsibilities.'" J.A. 348. In fact, several provisions of ERISA §§ 401-414 (apart from the prohibited transaction provisions at issue in this case) impose responsibilities on non-fiduciaries. *See, e.g.*, ERISA § 402(b), 29 U.S.C. § 1102(b) (establishing required features of a plan); ERISA § 411, 29 U.S.C. § 1111 (prohibiting persons who have been convicted of specified crimes from serving in certain non-fiduciary positions); ERISA § 412, 29 U.S.C. §1112 (requiring that "[e]very fiduciary of an employee benefit plan and every person who handles funds or other property of such a plan . . . shall be bonded.") Thus, the statutory context does not support the conclusion that § 406 deals solely with fiduciaries.

provision strongly supports the conclusion that a party in interest who engages in a prohibited transaction with a plan violates § 406.

2. **Section 502(i).** ERISA § 502(i), 29 U.S.C. § 1132(i), provides:

> In the case of a transaction prohibited by section 406 by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction . . . except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of [the Internal Revenue] Code) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code.

Section 502(i)'s reference to "a transaction prohibited by § 406 by a party in interest" supports the conclusion that § 406 prohibits certain *transactions*, and that a party in interest who engages such a transaction violates § 406(a). Moreover, § 502(i) imposes a civil penalty on any party in interest (including a non-fiduciary party in interest) who engages in a transaction prohibited by § 406(a) (except for a transaction with a plan described in § 4975(e)(1) of the Internal Revenue Code). Section 502(i), like § 3003, thus forecloses any argument that Congress merely intended to prohibit fiduciaries from causing plans to engage in prohibited transactions, while leaving non-fiduciary parties in interest free to engage in such transactions if they could get away with them. As the district court noted, if non-fiduciary parties in interest are not required to avoid engaging in

transactions prohibited under § 406(a), Congress would have no basis for penalizing them for engaging in such transactions. J.A. 304.

The court of appeals recognized that § 502(i) creates a "viable distinction" between non-fiduciary parties in interest who engage in transactions prohibited by § 406(a) and non-fiduciaries who assist a fiduciary in violating a fiduciary obligation under § 404 of ERISA, 29 U.S.C. § 1104. *Id.* 349. The court of appeals concluded, however, that § 502(i) "makes the absence of a specific provision imposing civil remedies on parties in interest all the more striking." *Id.* 350. But Congress is not required to enact specific provisions for each civil remedy that it creates. Congress may instead use general statutory language to create "catchall" remedial provisions, such as § 502(a)(3) and (a)(5), to provide a "safety net" in case more specific remedial provisions are inadequate. *See Varity Corp.*, 516 U.S. at 509-13 (rejecting a similar argument). Moreover, for the reasons explained in Part II below (*see* pages 33-35), Congress is unlikely to have intended § 502(i) as the *exclusive* remedy available against non-fiduciary parties in interest who engage in prohibited transactions.[12]

3. **§ 502*(l)*.** Section 502*(l)*, added to ERISA in 1989, provides:

> (1) In the case of –
>
> (A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or

[12] ERISA Section 408(a) also focuses on transactions, by giving the Secretary authority to exempt "any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 406 and 407(a)." 29 U.S.C. § 1108(a).

> (B) any knowing participation in such a breach or violation by any other person,
>
> the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.
>
> (2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary *or other person* with respect to a breach or violation described in paragraph (1) –
>
> (A) pursuant to any settlement agreement with the Secretary, or
>
> (B) ordered by a court to be paid by such fiduciary *or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).*

29 U.S.C. § 1132(*l*) (emphasis added).

The language of § 502*(l)* indicates that a non-fiduciary party in interest may be ordered to pay money "to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection . . . (a)(5)." If a non-fiduciary party in interest were not subject to such a judicial proceeding, there would be no "applicable recovery amount" for persons other than fiduciaries, and thus no basis for imposing a civil penalty against a non-fiduciary under § 502(*l*).[13]

[13] In *Mertens*, the Court suggested in passing that the phrase "other persons" in Section 502(*l*) may refer solely to cofiduciaries. *See* 508 U.S. at 260-61. But a cofiduciary *is* a fiduciary. Moreover, "person" is a defined term in ERISA, and it does not mean

(...footnote continued)

Subsection 502(*l*)(4) confirms that Congress intended § 502(a)(3) and (a)(5) to apply to non-fiduciary parties in interest who engage in prohibited transactions:

> The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or *other person with respect to such transaction under subsection (i) of this section and section 4975 of the Internal Revenue Code of 1986.*

29 U.S.C. §1132(*l*)(4) (emphasis added). As both Subsection (i) and § 4975 of the Internal Revenue Code explicitly apply to non-fiduciary parties in interest who engage in prohibited transactions. Section 502(*l*) thus provides strong textual support for the conclusion that non-fiduciary parties in interest, as well as fiduciaries, are prohibited from engaging in transactions proscribed by § 406. *See Mertens*, 508 U.S. at 265 n.1 (White, J., dissenting); *cf. Varity Corp.*, 516 U.S. at 510 (noting that § 502(*l*) supports the conclusion that awards of relief to participants and beneficiaries, as well as to plans, are authorized under § 502(a)(3)).

4. **Section 4975(h)**. Section 4975(h) of the Internal Revenue Code provides additional textual support for the conclusion that non-fiduciary parties in interest who engage in prohibited transactions with a plan are subject to civil actions for equitable relief under ERISA § 502(a)(3) and (a)(5). Section 4975 provides, in subsections (a) and (b), for

---

(. . . continued)
"fiduciary." *See* ERISA § 3(9), 29 U.S.C. § 1002(9). When Congress wished to refer solely to cofiduciaries in ERISA, it did so. *See* ERISA § 405, 29 U.S.C. § 1105 (providing that, in specified circumstances, "a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan").

the imposition of a two-tier excise tax on "disqualified persons" who participate in prohibited transactions and are not acting solely in a fiduciary capacity. Section 4975(h) provides: "Before sending a notice of deficiency with respect to the tax imposed by subsection (a) or (b), the Secretary [of the Treasury] shall notify the Secretary of Labor and provide him a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax." 26 U.S.C. § 4975(h). A "correction" is defined as "undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards." *Id.* § 4975(f)(5).

Section 4975(h) clearly assumes that the Secretary of Labor has the authority to "obtain a correction" of the prohibited transaction. *Id.* § 4975(h). The only means available to the Secretary of Labor to obtain a correction against a non-fiduciary disqualified person (or party in interest) is a civil action seeking restitution under § 502(a)(5). *See Reich v. Stangl*, 73 F.3d at 1034; *Reich v. Compton*, 57 F.3d at 286. If the Secretary of Labor is not authorized to bring such an action, § 4975(h) directs the Secretary of the Treasury and the Secretary of Labor to engage in a bureaucratic exercise in futility. It is unlikely that Congress would have required a formal reference to the Secretary of Labor to "obtain a correction" unless Congress believed that the Secretary of Labor is in fact authorized to do so. The text of § 4975(h) thus provides additional support for the conclusion that the Secretary (and, therefore, plan participants, beneficiaries, and fiduciaries) are authorized to bring actions for equitable relief against non-fiduciary parties in interest who engage in prohibited transactions.

D. "Appropriate Equitable Relief" Includes Restitution Of Plan Assets Without Regard To Whether The Defendant Itself Violated ERISA.

For the reasons explained above, the prohibited transaction provisions of § 406(a) apply not only to fiduciaries who cause a plan to engage in a prohibited transaction with a party in interest, but also to non-fiduciary parties in interest who engage in such transactions. But even if § 406(a) applied only to fiduciaries, non-fiduciary parties in interest would nevertheless be subject to actions for restitution under § 502(a)(3) and (a)(5). When a fiduciary causes a plan to enter into a prohibited transaction with a party in interest, there is clearly an "act or practice which violates" § 406(a). The fiduciary's act of causing the plan to enter into the transaction violates § 406(a), even if the non-fiduciary party in interest's act of entering into the transaction does not. Under well established principles of the law of equitable remedies, the "appropriate equitable relief" for such a violation includes an order requiring the non-fiduciary party in interest to disgorge plan assets obtained in the prohibited transaction, even if the party in interest did not violate ERISA.

"ERISA abounds with the language and terminology of trust law"; accordingly, in determining the scope and meaning of "appropriate equitable relief" under § 502(a)(3) and (a)(5), the Court should look to general "principles of trust law" developed by courts of equity. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989); *see also Varity Corp.*, 516 U.S. at 496; *Central States*, 472 U.S. at 570-71. In this instance, Congress *expressly* directed the courts to look to common (*i.e.*, non-statutory) law by authorizing "appropriate equitable relief" to redress violations of ERISA.

"[T]he 'equitable relief' awardable under § 502(a)(5) includes restitution of ill-gotten plan assets or profits." *See*

Mertens, 508 U.S. at 260.[14] The purpose of restitution is to prevent the defendant's unjust enrichment by recapturing the gains realized by the defendant on account of the transaction. Dobbs § 4.1(1) at 552; *Restatement of Restitution* § 1 (1937). Accordingly, "[r]estitution measures the remedy by the defendant's gain and seeks to force disgorgement of that gain. It differs in its goal or principle from damages, which measures the remedy by the plaintiff's loss and seeks to provide compensation for that loss." Dobbs § 4.1(1) at 555.

Courts of equity developed a variety of restitutionary remedies to avoid unjust enrichment, including constructive trusts, equitable liens, subrogation, and an accounting for profits. *See* Dobbs § 4.3(1)-(5); George Gleason Bogert, *Trusts and Trustees*, §§ 471-501 (rev. 2d ed. 1978); 5 Austin Wakeman Scott & William Franklin Fratcher, *Trusts*, §§ 461-464 (4th ed. 1989); *Restatement of Restitution* §§ 160-162 (1937). These remedies are clearly within the scope of "appropriate equitable relief" available under § 502(a)(3) and (a)(5). Indeed, ERISA's legislative history expressly states that restitution pursuant to a constructive trust is a form of "appropriate equitable relief." S. Rep. No. 93-383, at 105 (1973), 1 Leg. Hist. 1173 ("Appropriate equitable relief may be granted in a civil action. For example, . . . a constructive trust may be imposed on the plan assets, if needed to protect the participants and beneficiaries."). Lower court decisions confirm that restitution pursuant to a constructive trust is an appropriate

---

[14] Restitution is an equitable remedy when sought in a case in equity, and a legal remedy when sought in a case at law. *See, e.g., Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703, 710 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 979 (2000); *Reich v. Continental Cas. Co.*, 33 F.3d 754, 755-56 (7th Cir. 1994). *See generally* 1 Dan B. Dobbs, *Law of Remedies* § 1.2 at 11, § 4.1(1) at 556, § 4.1(3) at 564-65, §§ 4.2-.3 (2d ed. 1993) (hereinafter "Dobbs").

remedy under § 502(a)(3) and (a)(5). *See Health Cost Controls*, 187 F.3d at 710 (citing cases).

In accordance with its purpose of preventing unjust enrichment, restitution pursuant to a constructive trust is not available only with respect to trustees and other fiduciaries. *See id.* at 711 ("Granted that in times of yore the constructive trust was available only as a remedy against trustees and other fiduciaries, there is nothing to suggest that ERISA's drafters wanted to embed their work in a time warp." (citation omitted)). Nor is restitution limited to wrongdoers. Rather, restitution is available against *any* party that would be unjustly enriched by retaining possession of assets. *See* Dobbs § 4.3(2) at 597 ("[T]he constructive trust is no longer limited to misconduct cases; it redresses unjust enrichment, not wrongdoing."); *see also* Scott & Fratcher, *supra* § 462; *Restatement of Restitution* ch. 7 intro. note (1937).[15]

In sum, "appropriate equitable relief" to redress a violation of § 406(a) includes an order requiring a non-

[15] Assets subject to a constructive trust must be returned to the plaintiff unless the defendant is a "bona fide purchaser," that is, a person who gave value for the assets without knowledge of the circumstances that give rise to the constructive trust. *See Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.*, 67 F.3d 1063, 1068 (2d Cir. 1995) (quoting *Restatement (Second) of Trusts* § 284(1) (1959)); *accord Albee Tomato, Inc. v. A.B. Shalom Produce Corp.*, 155 F.3d 612, 615 (2d Cir. 1998); Dobbs § 4.7(l) at 661-62; *see also Restatement (Second) of Trusts* §§ 288-291 (1959). Knowledge of the breach of trust can be either actual or constructive. *E.g., Albee Tomato*, 155 F.3d at 616 ("a transferee has the requisite constructive knowledge when it 'should know' of the breach of trust"); *Restatement (Second) of Trusts* § 297 cmt. a (1959) ("A third person has notice of the breach not only when he knows of the breach, but also when he should know of it.").

fiduciary party in interest to return plan assets and profits, even if the party in interest has not violated ERISA.[16]

E. The Secretary Of Labor's Interpretation Of The Statutory Language Is Entitled To Deference.

When confronted with complex questions of statutory interpretation arising under ERISA, this Court has said: "For a court to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to 'embark[] upon a voyage without a compass.'" *Mead Corp. v. Tilley*, 490 U.S. 714, 726 (1989) (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980)). For the reasons set forth above, the statutory language answers the question presented in this case in Petitioners' favor. But if the Court were to conclude that the statutory language is ambiguous, the interpretation of the Secretary of Labor would be entitled to deference.

[16] Additional support for the conclusion that "appropriate equitable relief" under Section 502(a)(3) and (a)(5) includes "make whole" relief is found in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. In 1972 (two years prior to the enactment of ERISA), Congress amended Section 706 of Title VII to provide that a court may "order such affirmative action as may be appropriate, which may include . . . back pay, . . . *or any other equitable relief as the court deems appropriate*." 86 Stat. 103, 107 (1972) (codified as amended at 42 U.S.C. § 2000e-5(g)(l)) (emphasis added). When Congress employs statutory language that is nearly identical to language it has used in a prior statute, Congress generally is presumed to intend that the language be given the same meaning. *See Traynor v. Turnage*, 485 U.S. 535, 546 (1988). Moreover, Congress is presumed to be aware of prior judicial interpretations of similar statutory provisions. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). In 1974 (seven months before Congress enacted ERISA), this Court's opinion in *Curtis v. Loether*, 415 U.S. 189 (1974), stated that "the courts of appeals have characterized backpay as an integral part of an equitable remedy, a form of restitution," in Title VII cases. *Id.* at 197.

When Congress has not "directly spoken to the precise question at issue," the agency's interpretation of the statute must be accepted as long as it is "based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Apart from *Chevron*, an agency's interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

In this case, the agency's interpretation is not in doubt. The Secretary of Labor has brought actions against non-fiduciary parties in interest under § 502(a)(5). *See, e.g., Reich v. Compton*, 57 F.3d at 285-87; *Reich v. Stangl*, 73 F.3d at 1028-29; *Herman v. South Carolina Nat'l Bank*, 140 F.3d at 1419-22. Those cases could not have been brought unless the Secretary interpreted § 502(a)(5) – and, by necessary extension, § 502(a)(3) – as authorizing suits for equitable relief against non-fiduciary parties in interest that engage in prohibited transactions. In addition, the Secretary has filed briefs as an *amicus curiae* in the courts of appeals, *see, e.g., LeBlanc v. Cahill*, 153 F.3d at 138, and in this Court setting forth her interpretation of the statute.

In *Auer v. Robbins*, 519 U.S. 452 (1997), the Court deferred to the agency's position expressed for the first time in an *amicus* brief where the position is "in no sense a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack," and where there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462 (internal quotation and citation omitted). In this case, as in *Auer*, the agency's position is not a "*post hoc* rationalization," and there is no reason to suspect that the agency's position does not reflect its fair and considered judgment on the question presented. Accordingly, the Secretary's interpretation is entitled to deference.

II. INTERPRETING SECTION 502 TO PERMIT RECOVERY OF PLAN ASSETS FURTHERS THE PRINCIPAL PURPOSE OF ERISA.

ERISA, like other statutes, should be interpreted in the light of the "basic purposes" of the statute. *Varity Corp.*, 516 U.S. at 513; *see John Hancock Mut. Life Ins. Co.*, 510 U.S. at 94-95 (1993) (interpretation of ERISA guided by the "object and policy" of the statute). "The principal object [of ERISA] is to protect plan participants and beneficiaries." *Boggs*, 520 U.S. at 845. As several courts of appeals have recognized, unless plan participants and beneficiaries are permitted to seek restitution of plan assets from non-fiduciary parties in interest, it will often be "difficult or impossible to undo such illegal transactions" and restore the assets to the plan. *Nieto v. Ecker*, 845 F.2d at 874; *accord LeBlanc v. Cahill*, 153 F.3d at 152-53; *Reich v. Compton*, 57 F.3d at 286 (quoting *Nieto*). Moreover, as the court of appeals explained in *Reich v. Stangl*,

> It would make little sense to grant the Secretary such broad enforcement powers to stop ongoing violations of ERISA and then to limit the Secretary's power to recover plan assets acquired through these same violations. Such an interpretation of § 502(a)(5) would effectively create a zone of immunity, protecting the illegitimate gains of parties in interest who have completed prohibited transactions that the Secretary could have enjoined while they were occurring.

73 F.3d at 1031.

A. Section 502(i) Does Not Provide Adequate Protection For Plan Participants And Beneficiaries.

Section 502(i)'s civil penalty provision provides no assurance that non-fiduciary parties in interest will return plan assets obtained in a prohibited transaction. Accordingly, it is unlikely that Congress intended § 502(i) as the exclusive

remedy available against non-fiduciary parties in interest that engage in prohibited transactions.

First, § 502(i) establishes a civil *penalty*, not a remedy. The penalty is paid to the federal government, not to the plan. To be sure, a party in interest may avoid a 100 percent penalty by making a correction. But § 502(i) is not structured in a way that creates a clear economic incentive for a party in interest to return assets to the plan. If the party in interest does *not* correct the transaction, the penalty may not exceed "100 percent of the amount involved." ERISA § 502(i), 29 U.S.C. § 1132(i). If, on the other hand, the party in interest *does* correct the transaction, it remains subject to a penalty of "5 percent of the amount involved . . . for each year or part thereof during which the prohibited transaction continues." *Id.* As the district court noted, a profit-maximizing party in interest might choose to pay a 100 percent penalty to the government rather than repaying the plan 100 percent of the amount involved and in addition paying the government a penalty of 5 percent of the amount involved multiplied by the number of years the transaction goes uncorrected. *See* J.A. 306.[17]

Second (and even more significant as a practical matter), the Department of Labor simply lacks the enforcement resources to detect and penalize all (or even most) prohibited transactions.[18] Thus, if § 502(i) is the exclusive means available under ERISA to force parties in interest to correct

---

[17] Section 502(i) makes sense when viewed as a non-exclusive penalty provision. Because the party in interest remains subject to an action for restitution under Section 502(a)(3) or (a)(5), it cannot reduce its overall liability by refusing to correct the transaction.

[18] *See* H.R. Conf. Rep. No. 101-386, at 432 (1989) (noting that the Department of Labor oversees about 5.5 million employee benefit plans, but has resources to investigate only about 3,000 plans per year).

prohibited transactions, it is inevitable that many prohibited transactions will go uncorrected.

Third, § 502(i) applies only to a subset of ERISA plans, primarily welfare benefit plans. Section 502(i) does not apply at all to "a transaction with respect to a plan described in section 4975(e)(1)," such as the Ameritech plans involved in this case. For these reasons, § 502(i) provides inadequate protection for plan participants and beneficiaries.

B. Section 4975 Does Not Provide Adequate Protection For Plan Participants And Beneficiaries.

Section 4975, like § 502(i), falls well short of providing adequate protection for plan assets. As one court of appeals has explained:

> The fact that Congress has provided an explicit penalty for parties in interest who participate in prohibited transactions does not affect our conclusion that § 502(a)(3) provides a *remedy* against such persons. The tax is not a remedy but, in essence, a civil penalty; interpreting the tax as exclusive would leave plans and their participants with no recourse against persons clearly covered by the Act who violate its provisions, not a result likely contemplated by Congress.

Nieto, 845 F.2d at 874 n.6.

Congress plainly did not view § 4975 as an exclusive remedy, because it required the Secretary of the Treasury to "notify the Secretary of Labor and provide him a reasonable opportunity to obtain a correction of the prohibited transaction." 26 U.S.C. § 4975(h). It is not surprising that Congress viewed § 4975 as non-exclusive. Only the Internal Revenue Service is authorized to enforce the excise tax. The Service is authorized to waive the second-tier tax "in appropriate cases." ERISA § 3003(a), 29 U.S.C. § 1203(a). Given its role as a tax collection agency, there is no

assurance that the Service will give priority to the interests of plan participants and beneficiaries. Moreover, the Service has the resources to audit only a tiny fraction of the hundreds of thousands of pension plans established by employers throughout the country.[19] Collection of the excise tax thus depends largely on voluntary self-assessment by the disqualified persons who participate in prohibited transactions. It is unrealistic to believe that either the Service or disqualified persons will adequately protect the interests of plan participants and beneficiaries. The many demands on the Service's resources, and the number, size, and complexity of the plans to which the excise tax applies, prevent the Service from asserting excise tax liability in a significant percentage of the cases to which the tax applies.[20] Relying

---

[19] In 1995, 693,404 pension plans filed Form 5500 series reports with the Internal Revenue Service. *See* Pension and Welfare Benefits Administration, U.S. Department of Labor, *Private Pension Plan Bulletin: Abstract of 1995 Form 5500 Annual Reports*, No. 8 (Spring 1999).

[20] Total receipts from the first-tier excise tax under Section 4975 represent a tiny fraction of the Treasury's total receipts. *See* H.R. Conf. Rep. No. 105-220, at 794 (1997) (estimating that an increase in the tax rate from 10 percent to 15 percent would produce additional revenue of $2 million in 1998 and $4 million per year thereafter); Joint Committee on Taxation, *Estimated Budget Effects of Chairman's Mark of a Committee Amendment to the Revenue Provisions of H.R. 3448, the "Small Business Job Protection Act of 1996," Scheduled for Finance Committee Markup on June 12, 1996*, No. JCX-27-96, at 3 (June 11, 1996) (estimating that an increase in the 5 percent tax rate to 10 percent would produce additional tax revenues of $2 million in 1997 and $4 million per year thereafter). By comparison, for the 1997 fiscal year, the Treasury Department reported aggregate receipts of $1,578,951 million, including aggregate corporate and individual income tax receipts of $919,759 million and aggregate excise tax receipts of $56,926 million. *See* Financial Management Service, U.S. Department of the Treasury, *United States Government Annual Report - Fiscal Year 1997* (Receipts by Source Category).

on voluntary self-assessment by the disqualified persons amounts to relying on the fox to guard the hen house.

Moreover, because the Code's excise tax provisions differ in certain respects from ERISA's prohibited transaction provisions, the excise tax does not apply to all of the transactions that ERISA prohibits. For example, the definition of "party in interest" in Title I is broader in certain respects than the definition of "disqualified person" in § 4975:

- Title I defines a "party in interest" to include *all* employees of certain parties in interest. By contrast, § 4975 defines a "disqualified person" to include only "highly compensated employees." *Compare* ERISA § 3(14)(H), 29 U.S.C. § 1002(14)(H), *with* 26 U.S.C. § 4975(e)(2)(H).

- Title I defines a "party in interest" to include employees, officers, directors, and 10 percent-or-greater shareholders of service-providers to the plan. § 4975 does not include these parties in its definition of "disqualified person." *Compare* ERISA § 3(14)(H), 29 U.S.C. § 1002(14)(H), *with* 26 U.S.C. § 4975(e)(2)(H).

- Title I defines a "party in interest" to include a 10 percent-or-greater partner or joint venturer of a service-provider to the plan. Section 4975 does not include these parties in its definition of a "disqualified person." *Compare* ERISA § 3(14)(I), 29 U.S.C. § 1002(14)(I), *with* 26 U.S.C. § 4975(e)(2)(I).

Because the two definitions differ, some party-in-interest transactions prohibited by Title I are not subject to the Code's excise tax on disqualified persons. If the excise tax is the exclusive remedy available against nonfiduciary parties

in interest, the consequence is that there is no remedy at all against non-fiduciary parties in interest for some prohibited transactions.

C. Other Potential Remedies Do Not Provide Adequate Protection For Plan Participants And Beneficiaries.

Respondents have pointed to ERISA claims against fiduciaries and "potential[]" claims against parties in interest under state law or other federal laws as sufficient to protect plan assets. Br. in Opp. 17. In fact, these additional remedies are not adequate to ensure that plans will recover assets transferred to a non-fiduciary party in interest in a prohibited transaction. A fiduciary that causes the plan to engage in the prohibited transaction may not possess sufficient assets of its own to make up the loss. *See Reich v. Continental Cas. Co.*, 33 F.3d at 757 (noting that fiduciary lacked sufficient assets). Moreover, claims under other laws may well be barred under ERISA's powerful preemption provision.

Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides: "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)]." As this Court has recognized, ERISA's "'pre-emption clause is conspicuous for its breadth.'" *Ingersoll-Rand*, 498 U.S. at 138 (quoting *FMC Corp. v. Holliday*, 498 U.S. 52, 56 (1990)). In *Mertens*, four Justices observed that "it is difficult to imagine how any common-law remedy for . . . participation in a breach of fiduciary duty concerning an ERISA-governed plan . . . could have survived the enactment of ERISA's 'deliberately expansive' preemption provision." 508 U.S. at 267 n.2 (White, J., dissenting) (quoting *Ingersoll-Rand*, 498 U.S. at 138 (citation omitted)). In this case, the

district court has already held that Petitioners' state-law claims are preempted by § 514(a). Although that ruling was not certified for interlocutory appeal (and in any event was influenced by the district court's conclusion that Congress intended "to make § [502(a)(3)] plaintiffs' exclusive remedy," J.A. 337), it nevertheless suggests that if the Court were to hold that § 502(a)(3) does not provide a remedy, participants and beneficiaries might be left with no remedy at all against non-fiduciary parties in interest who engage in prohibited transactions l.[21]

III. THE LEGISLATIVE HISTORY OF ERISA IS CONSISTENT WITH THE STATUTORY LANGUAGE.

Although the court of appeals "hesitate[d] to give too much weight to the legislative history" of ERISA, J.A. 353, it nevertheless concluded that the legislative history supports its reading of ERISA. The court of appeals' hesitation was well-founded. The legislative history of ERISA is entirely consistent with the view that courts may award appropriate equitable relief under § 502(a)(3) and (a)(5) against parties in interest who engage in prohibited transactions.

The most relevant piece of legislative history is at odds with the court of appeals' position. The Conference Report

---

[21] Interpreting Section 502(a)(3) and (a)(5) to authorize equitable relief against non-fiduciary parties in interest who engage in prohibited transactions will not undermine the purposes and goals of ERISA. At least one court has expressed concern that "extending the threat of liability over the heads of those who only lend professional services to a plan without exercising any control over, or transacting with, plan assets will deter such individuals from helping fiduciaries navigate the intricate financial and legal thicket of ERISA." *Reich v. Rowe*, 20 F.3d at 32. That concern is not present when a defendant engages in a prohibited transaction with the plan (rather than merely advising the plan) and is subject only to an action seeking restitution of plan assets and profits (rather than an action seeking open-ended liability for damages).

that accompanied ERISA states that "the conference substitute prohibits plan fiduciaries *and parties-in-interest* from engaging in a number of specific transactions." H.R. Conf. Rep. No. 93-1280, at 306 (1974), 3 Leg. Hist. 4573 (emphasis added). As the court of appeals acknowledged, this statement "impl[ies] that *both* parties to the transaction would be liable" under § 406. J.A. 352 (emphasis added); *see also* H.R. Conf. Rep. No. 93-1280, at 307 (1974), 3 Leg. Hist. 4574 ("there is no reason to impose a sanction on a fiduciary (or party-in-interest)" where neither knows the identity of the other).

Other aspects of the legislative history lend further support to the conclusion that Congress intended to authorize actions for equitable relief against parties in interest who engage in prohibited transactions. For one thing, the legislative history describes ERISA's enforcement provisions as intended to "'provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA].'" *Varity*, 516 U.S. at 512 (quoting S. Rep. No. 93-127, at 35 (1973), 1 Leg. Hist. 621 (describing Senate version of enforcement provisions); H.R. Rep. No. 93-533, at 17 (1973), 2 Leg. Hist. 2364 (describing House version in identical terms)). For another, "the legislative history of ERISA repeatedly states that the statute was enacted to protect plan beneficiaries' interests in plan assets." *Stangl*, 73 F.3d at 1034. It therefore seems unlikely that Congress intended to "leave plans and their participants with no recourse against persons clearly covered by the Act who violate its provisions." *Nieto*, 845 F.2d at 874 n.6.

The Seventh Circuit focused on a different aspect of the legislative history. The Senate originally passed a version of ERISA that explicitly imposed liability on non-fiduciaries;

the House version did not contain a parallel provision.[22] The Senate's provision was not included in the final version of ERISA. The court of appeals concluded that Congress considered imposing civil liability on parties in interest who engage in prohibited transactions, and decided not to do so.

The court of appeals' conclusion was unwarranted. Although the Conference Committee decided not to adopt the more particularized enforcement provisions of the Senate version, the Committee also decided to insert language from the Senate bill to create the "catchall" provisions of § 502(a)(3) and (a)(5). *Compare* H.R. 2 (Senate version) § 693, 3 Leg. Hist. 3816-17, *with* ERISA § 502(a). *See also* H.R. Conf. Rep. No. 93-1280, at 327 (1974), 3 Leg. Hist. 4594 (conferees expanded § 502 to allow "an action for breach of a fiduciary duty *or* to enjoin any act or practice which violates the provision of title I of the Act *or* to obtain any other appropriate relief to enforce any provision of that title") (emphasis added). This sequence of events does not indicate that Congress intended to insulate non-fiduciary parties in interest from civil liability.

ERISA § 502(a)(3) and (a)(5) originated in the Senate bill's enforcement provisions. Section 693 of the Senate bill,

---

[22] The Senate Bill provided:

> Any party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act applies, shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay the fund any profits realized by him from such transaction.

H.R. 2, 93d Cong. § 511 (as passed by the Senate on Mar. 4, 1974) (hereinafter "H.R. 2 (Senate version)") (adding § 15(i)), 3 Leg. Hist. 3599, 3780.

entitled "Actions to Redress or Restrain Violations of Fiduciary Duty," provided:

> Civil actions for appropriate relief, legal or equitable, to redress or restrain a breach of any responsibility, obligation, or duty of a fiduciary, including but not limited to, the removal of a fiduciary . . . or against any person who has transferred or received any of the assets of a plan or fund in violation of the fiduciary requirements [of ERISA] . . . may be brought by any participant or beneficiary of [a plan subject to ERISA].

H.R. 2 (Senate version) § 693 (1974), 3 Leg. Hist. 3816. Section 692, entitled "Civil Actions by Secretary of Labor," provided:

> Whenever the Secretary believes that an employees' benefit fund is being or has been administered in violation of the requirements of [ERISA] . . ., the Secretary may petition any district court of the United States having jurisdiction of the parties or the United States District Court for the District of Columbia for an order (1) requiring return to such fund of assets transferred from such fund in violation of the requirements of such Act, (2) requiring payment of benefits . . ., and (3) restraining any conduct in violation of the fiduciary requirements of such Act, or of this Act, and granting such other relief as may be appropriate to effectuate the purposes of this Act."

H.R. 2 (Senate version) § 692, 3 Leg. Hist. 3815-16.

In contrast to Sections 692 and 693 of the Senate bill, the House bill provided a more limited range of civil remedies. The House bill provided that:

> Civil actions under this title may be brought -
>
> . . .

> (2) by the Secretary, or by a participant, beneficiary, or fiduciary for appropriate relief under section 111(d); or
>
> (3) by the Secretary, or by a participant, beneficiary, or fiduciary to enjoin any act or practice which violates any provision of this title.

H.R. 2, 93d Cong. § 503(e) (as passed by the House on Feb. 28, 1974) (hereinafter "H.R. 2 (House version)"), 3 Leg. Hist. 4047. Section 111(d) of the House bill, enacted as ERISA § 409(a), dealt with a fiduciary's personal liability for breach of fiduciary duty. *See* H.R. 2 (House version) § 111(d), 3 Leg. Hist. 3953-54.

As the Conference Report explained, the House bill authorized the Secretary only "to bring suit for breach of fiduciary responsibility and to enjoin any act or practice" that violates ERISA. H.R. Conf. Rep., No. 93-1280, at 327 (1974), 3 Leg. Hist. 4594. In contrast, the Senate's version conferred specific grants of authority, including actions seeking the return of transferred plan assets. H.R. 2 (Senate version) §§ 692-93, 3 Leg. Hist. 3815-17.

As ultimately enacted by Congress, § 502 of ERISA did not include the particularized remedies set forth in the Senate bill, nor did it limit the available remedies to those provided for in the House bill. Instead, § 502 provided for the types of relief included in the House version, and in addition authorized "any other appropriate relief to enforce any provision of [Title I]." *See* H.R. Conf. Rep., No. 93-1280, at 327-28 (1974), 3 Leg. Hist. 4594. The addition of an expansive "catch-all" provision, derived from the Senate bill, reflects Congress's intent to provide the broadest possible range of equitable remedies to the Secretary of Labor and private plaintiffs. *See Varity Corp.*, 516 U.S. at 512. Accordingly, Congress's decision not to enact the Senate's specific provisions does not support the conclusion that

Congress decided not to impose liability on non-fiduciary parties in interest that engage in prohibited transactions.[23]

IV. THIS COURT'S DECISIONS IN *MERTENS* AND *LOCKHEED* DO NOT SUPPORT THE COURT OF APPEALS' DECISION.

A. *Mertens* Does Not Support The Court Of Appeals' Decision.

Most courts of appeals have understood this Court's decision in *Mertens* to be entirely consistent with the view that equitable relief is available under § 502(a)(3) and (a)(5) against non-fiduciary parties in interest who engage in a prohibited transaction with a plan.[24] The Seventh Circuit, in contrast, read *Mertens* as providing strong support for the view that such relief is not available. *See* J.A. 353 ("Ultimately, the dicta in *Mertens* . . . provide[ ] the most guidance.") The Seventh Circuit's reliance on *Mertens* is unwarranted. Neither *Mertens* nor the Court's subsequent

---

[23] To be sure, remedies available under the final version of ERISA are not identical to those available under the Senate bill. As the district court observed, the Senate bill's provisions

> would have imposed personal liability on parties in interest, subjecting them to claims for legal relief, *e.g.*, damages. The rejection of those provisions, however, does not necessarily rule out the potential for a compromise somewhere between no civil liability and personal liability for all losses, *e.g.*, the availability of a suit limited to equitable relief.

J.A. 308. "[T]he final language of [Section 502(a)], with its inclusion of catch-all provisions for equitable relief, appears to be just such a negotiated compromise." *Id.*

[24] *See Reich v. Rowe*, 20 F.3d at 31-33; *Reich v. Compton*, 57 F.3d at 285; *Landwehr v. DuPree*, 72 F.3d at 734; *Reich v. Stangl*, 73 F.3d at 1031-32; *Herman v. South Carolina National Bank*, 140 F.3d at 1421-22; *LeBlanc v. Cahill*, 153 F.3d at 151-53.

decision in *Lockheed* supports the result reached by the court of appeals in this case.

The *holding* in *Mertens* – that ERISA does not authorize suits *for money damages* against non-fiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty – provides no support whatever for the Seventh Circuit's ruling. In this case, Petitioners are seeking restitution rather than damages, and the Court recognized in *Mertens* that "the 'equitable relief' awardable under § 502(a)(5) [and § 502(a)(3)] includes restitution of ill-gotten plan assets or profits." 508 U.S. at 260.[25]

The Court's opinion in *Mertens* expressly reserves decision on the question whether § 502(a)(3) and (a)(5) authorize suits against non-fiduciaries who assist a fiduciary in violating its fiduciary obligations. 508 U.S. at 254-55. In *dicta*, the Court expressed doubt that such a suit is available:

> [W]hile ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries, including actuaries, no provision explicitly requires them to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty. It is unlikely,

---

[25] The Court explicitly stated that the question whether the defendant's "activities constituted a party-in-interest transaction prohibited by ERISA" was not before it. 508 U.S. at 251 & n.2. In fact, the defendant "was paid by Kaiser, not from assets of the plan." *Mertens v. Hewitt Associates*, 948 F.2d 607, 612 (9th Cir. 1991). Moreover, the plaintiffs in *Mertens* were seeking to impose "joint and several liability, for *all* direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did." 508 U.S. at 262. In this case, in contrast: (1) Respondents acquired plan assets through a prohibited transaction with the plan; (2) Respondents, as essential parties to the transaction, had power to prevent the transaction; and (3) Petitioners are seeking restitution of plan assets and profits rather than joint and several liability for damages.

> moreover, that this was an oversight, since ERISA *does* explicitly impose "knowing participation" liability on cofiduciaries. See § 405(a), 29 U.S.C. § 1105(a). That limitation appears all the more deliberate in light of the fact that "knowing participation" liability on the part of *both* cotrustees and third persons was well established under the common law of trusts.

Id. at 253-54 (footnote and citations omitted). In a footnote to the statement that "ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries," the Court added: "For example, a person who provides services to a plan is a 'party in interest,' 29 U.S.C. § 1002(14)(B), and may not offer his services or engage in certain transactions with the plan, § 1106(a), for more than reasonable compensation, § 1108(b)(2)." 508 U.S. at 254 n.4.

The Court also commented that

> [p]rofessional service providers such as actuaries . . . must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406, and pay related civil penalties, see § 502(i), 29 U.S.C. § 1132(i), or excise taxes, see 26 U.S.C. § 4975; and (assuming nonfiduciaries can be sued under § 502(a)(3)) may be enjoined from participating in a fiduciary's breaches, compelled to make restitution, and subjected to other equitable decrees.

508 U.S. at 262.

The fiduciary-duty provisions at issue in *Mertens* (primarily Sections 405, 409, and 502(a)(2)) differ from Sections 406 and 502(a)(3) and (a)(5). In general, there are no necessary "counter-parties" to fiduciary violations. In contrast, a party in interest *is* a necessary counter-party to a prohibited transaction between a plan and a party in interest.

Thus, Petitioners clearly are not seeking "'appropriate equitable' relief *at large*, but only 'appropriate equitable relief' for the purpose of 'redress[ing any] violations . . .' of ERISA." 508 U.S. at 253.

Because the *Mertens dicta* are consistent with the proposition that parties in interest who engage in prohibited transactions may be sued for restitution under ERISA, the Court need not reconsider those *dicta* in order to decide the question in this case in Petitioners' favor. It is nevertheless significant that in *Mertens* four Justices expressed the view that § 502(a)(3) *does* permit actions for equitable remedies against non-fiduciaries who participate in a fiduciary's breach of duty. *See* 508 U.S. at 263, 265 n.1 (White, J., dissenting, joined by the Chief Justice, Justice Stevens, and Justice O'Connor). The Justices who joined Justice White's opinion reasoned that § 502(a)(3) creates a cause of action "'to redress . . . violations' of the statute." *Id.* There is no reason to conclude that § 502(a)(3) "stop[s] with the breaching fiduciary," because the statutory text "does not expressly provide for such a limitation and it does not seem appropriate to import one, given that trust beneficiaries clearly had such a remedy at common law" and that ERISA "is grounded in that common law and was intended, above all, to protect the interests of beneficiaries." *Id.* Moreover, "§ 502(*l*)[] seems clearly to reflect Congress' understanding that ERISA provides such a remedy." *Id* For these reasons (as well as the fact equitable remedies are not restricted to wrongdoers), *Mertens' dicta* concerning the availability of actions against non-fiduciaries outside the prohibited transaction context should not be adopted as a holding of this Court.

B. *Lockheed* Does Not Support The Court Of Appeals' Decision.

Finally, this Court's decision in *Lockheed* is also entirely consistent with the conclusion that non-fiduciary parties in

interest who engage in prohibited transactions are subject to suits for equitable relief under § 502(a)(3) and (a)(5). *Lockheed* holds that § 406 is not violated unless the plaintiff shows that a fiduciary caused the plan to engage in a prohibited transaction. The holding in *Lockheed*, like the holding in *Mertens*, provides no support for the court of appeals' ruling in this case.[26] Indeed, the Court's opinion in *Lockheed* explicitly states that its decision is consistent with cases holding that a non-fiduciary party in interest who engages in a transaction prohibited by § 406(a) is subject to a suit for equitable remedies. 517 U.S. at 889 n.3.

As the Seventh Circuit recognized, "in *Lockheed* the Court was once again not addressing the issue of party-in-interest liability under § [406]." J.A. 352. Although other courts of appeals have detected in *Lockheed* indications of support for party-in-interest liability, *see LeBlanc v. Cahill*, 153 F.3d at 152; *Herman v. South Carolina National Bank*, 140 F.3d at 1422 n.14, it is fair to say that *Lockheed* leaves the question open. On the one hand, the Court's opinion in *Lockheed* observes that the *Mertens* comments concerning party-in-interest liability (like its comments concerning non-fiduciary liability generally) were *dicta*. On the other hand, it recognizes that a number of courts of appeals have relied on the *Mertens dicta* in finding a cause of action against parties in interest that participate in prohibited transactions, does not suggest that those courts were in error, and explicitly recognizes that the result reached by those courts is consistent with the holding in *Lockheed*.

---

[26] In this case, it is clear that (1) NISA, as investment manager with discretionary authority over investment decisions, was a fiduciary, and (2) NISA caused the transactions to occur.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Of Counsel:

Susan R. Lichtenstein
Senior Vice President and
General Counsel
AMERITECH CORPORATION
30 South Wacker Drive
Chicago, Illinois 60606
(312) 750-5200

Patricia J. Winter
Counsel
AMERITECH CORPORATION
225 West Randolph Street
Chicago, Illinois 0606
(312) 727-2454

Robert A. Long, Jr.
Counsel of Record
John M. Vine
Michael R. Bergmann
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Charles C. Jackson
SEYFARTH, SHAW,
FAIRWEATHER
& GERALDSON
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Counsel for Petitioners

February 2000